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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 94

UNITED STATES OF AMERICA, APPELLANT

v.

EL PASO NATURAL GAS COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion. The findings of fact and conclusion of law (R. 45–72)[1] are not reported.

JURISDICTION

Final judgment dismissing the complaint after trial was entered on November 20, 1962 (R. 45). The United States filed a notice of appeal on January 18,

[1] "R" refers to the printed record. The trial transcript constitutes pages 1–277 of the original record, the remainder of which consists of exhibits. In Appendix A, *infra*, pp. 62–65, we indicate the page numbers in the original transcript at which each exhibit was admitted in evidence.

1963 (R. 72–73). Probable jurisdiction was noted on May 27, 1963 (R. 1098; 373 U.S. 930). The jurisdiction of this court is conferred by Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

QUESTION PRESENTED

Whether the purchase of the stock and assets of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Company was, on the undisputed facts, an acquisition the effect of which "may be substantially to lessen competition" in the sale of natural gas in California in violation of Section 7 of the Clayton Act.[1]

STATUTE INVOLVED

Section 7 of the Clayton Act, 28 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in relevant part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the

[1] We have not receded from our position that the merger of two major pipeline companies which tends substantially to lessen competition in the acquisition of natural gas supplies constitutes a violation of Section 7. However, in the overall context of this case, we believe that the government's contention that the acquisition contravened the statute should stand or fall upon a consideration of its impact upon competition in the transportation and sale of natural gas in the California market. Without abandoning the point in principle, therefore, we do not press in this brief the contention, urged in the Jurisdictional Statement, that the merger had the requisite anti-competitive effect upon the exploration for and purchase of gas supplies in the San Juan Basin and Rocky Mountain producing areas.

Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

This is a direct appeal from a final judgment entered after trial, dismissing the government's complaint alleging a violation of Section 7 of the Clayton Act. The complaint, filed July 22, 1957, charged that the effect of the acquisition of Pacific Northwest Pipeline Corporation ("Pacific Northwest") by El Paso Natural Gas Company ("El Paso") may be substantially to lessen competition in the exploration for, and the production, purchase and sale of natural gas in designated areas in the western United States.

I

THE FACTS

A. DESCRIPTION OF THE DEFENDANTS

1. El Paso

At the time of the acquisition, El Paso, a large, aggressive company, was the sole out-of-state supplier of natural gas to the enormous and expanding California market. Incorporated in 1928, El Paso was operating, at the time of the merger, an integrated, inter-connected pipeline system of over 6,700 miles (R. 10, 359) with vast gas-supply resources. In the

year preceding the acquisition, the company had total assets of $909.5 million and its operating revenues were $221.5 million (R. 358).

Approximately 89 percent of the gas transported through its lines is purchased by El Paso from independent natural gas producers, while the rest is obtained from gas-producing properties owned by El Paso itself (R. 290). El Paso produces and purchases natural gas in three areas of the United States: the Permian Basin in southeastern New Mexico and adjacent west Texas; the Panhandle Field in the Texas and Oklahoma Panhandle area; and the San Juan Basin in northwestern New Mexico and southwestern Colorado (R. 290). As of January 1, 1957, estimated reserves of 14,420 billion cubic feet of gas (55 percent of which were developed) (R. 714) were dedicated to El Paso.

El Paso sells natural gas for resale in California, Nevada, Texas, New Mexico, and Arizona, and also makes some direct sales to industrial consumers and municipalities along the routes of its pipelines (R. 96, 97, 104). Through a wholly owned but physically unconnected subsidiary, Utah Natural Gas Company, it sells gas for ultimate consumption in the Salt Lake City area (R. 135, 136). In transmitting and selling gas, El Paso is not a common carrier; it is under no duty to transport gas for anyone and seldom transports gas which it does not itself own.

El Paso's principal customers are the large natural gas distribution companies in California: Pacific Gas and Electric Company ("Pacific Gas") which

distributes natural gas at retail in the northern half of the State, and the two wholly owned subsidiaries of Pacific Lighting Corporation, the Southern California Gas Company and the Southern Counties Gas Company of California ("Southern Companies"), which together distribute natural gas at retail to consumers in the southern half of California (R. 700). All deliveries to the California distributing companies are made at the California-Arizona border at Topock, Arizona, and at Blythe, California; El Paso does not operate a pipeline within the State of California (R. 97). In 1961 El Paso's sales to the California distributing companies accounted for 62 percent of all gas sold by the company (R. 363) and 57.3 percent of all natural gas consumed in California (R. 377).

2. Pacific Northwest

Pacific Northwest was incorporated in 1949 and a year later applied to the Federal Power Commission for authorization to construct and operate a pipeline from the San Juan Basin, New Mexico, to the State of Washington (R. 294–295), designed to supply gas to the then unserved States of the Pacific Northwest. After receiving the Commission's approval in June 1954, the company sought and successfully obtained financing for its project, and in late 1954 began construction (R. 751–752, 702). As originally certificated, Pacific Northwest was to be a small-capacity line terminating in Seattle (R. 121). In November 1955, however, the Power Commission issued a second certificate, authorizing an expansion of the system to accommodate large quantities of Canadian gas (R.

295, 120–121), which Pacific Northwest had undertaken to transport from the Canadian border for delivery to El Paso in Montana and eventual sale by El Paso in California (see *infra*, p. 8). By 1960, the authorized capacity of Pacific Northwest, originally 350 million cubic feet per day in 1954, had increased to 1.1 billion cubic feet per day (R. 410).

In August 1956—barely four months before the stock acquisition became effective (January 1, 1957), and while its pipeline was still under construction—Pacific Northwest began making small deliveries of gas, but it operated on only a limited scale for more than a year and did not commence to receive gas from its Canadian sources until the close of 1957 (R. 338, 890). In that year the company had a net loss of $2,067,005; in the following year, the first full year of operation by the completed system, it showed a profit of $271,651 (R. 893); and in 1959, the figure was increased to $3,619,971 (R. 895).

At the time of its acquisition by El Paso, Pacific Northwest had constructed and placed in operation approximately 2,300 miles of main and lateral pipeline, extending from the San Juan Basin through Colorado, Utah, Wyoming, Idaho, Oregon and Washington to a terminus (Sumas, Washington) at the Canadian border (R. 702). It produced and purchased natural gas in the San Juan Basin, sold this gas wholesale to distribution companies in Washington, Oregon, and Idaho, made direct sales to industrial customers in cities and towns along the route

of its pipeline, and also sold gas to other pipeline companies for resale in Wyoming, Colorado, and Utah.

A unique feature of the Pacific Northwest line was the fact that it was connected or adjacent, not only to the San Juan Basin reserves at its southern extremity but also to substantial Canadian reserves at its northern end and to Rocky Mountain reservoirs along its route (R. 900). This multiple access to reserves enormously increased the flexibility and capacity of the system, for it meant that gas could be made to flow from either or both termini to some central point in the line, and thence transported to a major market (R. 864). At the end of 1957, an estimated 8.47 trillion cubic feet of gas reserves were under its control, including 3.5 trillion cubic feet which the company owned outright in the San Juan Basin; 1.04 trillion cubic feet under long-term purchase contract in the San Juan Basin; 1.59 trillion cubic feet under contract in the Rocky Mountain area; and 2.33 trillion cubic feet under contract in Canada (R. 892). In 1958 it was estimated that one-half of the natural gas sold by Pacific Northwest came from Canadian sources (R. 324).

B. THE ATTEMPTS BY PACIFIC NORTHWEST TO ENTER THE CALIFORNIA MARKET

1. Pacific Northwest, almost from its inception, sought to enter the rapidly expanding California market, of which El Paso was the only out-of-state supplier.[3] In 1954, shortly after its original certification

[3] In 1956, El Paso supplied more than 50 percent of all gas consumed in the State, the remainder coming from intrastate sources (R. 377).

by the Federal Power Commission, Pacific Northwest discussed with Pacific Gas and Electric the economics of utilizing Canadian gas by means of existing pipeline facilities (R. 858–859) and prepared detailed plans and analyses regarding the transportation of Canadian gas to California (R. 857–858, 868–869).

These unilateral efforts were temporarily suspended when, on December 11, 1954, Pacific Northwest entered into three contracts, two with El Paso and one with Westcoast Transmission Company, Ltd. ("Westcoast"), a Canadian pipeline with large reserves in British Columbia and Alberta, and with "definite plans" of its own to enter the California market (R. 762). In the latter agreement, Pacific Northwest undertook to purchase 300 million cubic feet per day from Westcoast at the Canadian border and (with Federal Power Commission approval) to make such modifications in its system as would be necessary to handle the huge additional volume (R. 309). On the same day, Pacific Northwest agreed to deliver 250 million cubic feet per day to El Paso at Mountain Horne, Idaho, for transportation to California through Reno, Nevada (R. 199). In the third contract (the "Exchange Gas Agreement"), El Paso arranged to make loans of gas to Pacific Northwest from its wells in the San Juan Basin for a five-year period; and the two companies agreed to use their respective gathering systems cooperatively, so as to avoid duplication of facilities, with Pacific Northwest gathering the gas from El Paso's wells in the eastern portion of the Basin and El Paso performing the

same service for Pacific Northwest in the western portion (R. 201–202, 203). The purpose of the agreements, as described by Ray C. Fish, the chief executive of Pacific Northwest in a contemporaneous letter to his stockholders, was to protect Pacific Northwest's market from future competition, and to enable all parties to work together for a common end rather than fighting one another (R. 801–803). Mr. Fish characterized the agreements as a "treaty" which would "solve the major problems which have been confronting us" (*ibid.*).

El Paso's agreement to purchase 250 million cubic feet of Canadian gas from Pacific Northwest at Mountain Home was never implemented. The arrangement was conditional upon El Paso's securing Federal Power Commission approval of a plan to construct a spur from the Pacific Northwest line at Mountain Home to a point on the California-Nevada border near Reno and there to sell the Canadian gas to the California distribution companies. Such authorization, however, could not be secured, since the distribution companies refused to accept gas at any point other than Topock, Arizona (R. 205–206). Consequently, the December 11 agreement was superseded by one dated August 23, 1955, in which El Paso undertook to purchase a lesser amount, 50 million cubic feet, to be delivered on an exchange basis at Ignacio, Colorado (R. 416, 417). Pacific Northwest, which, despite these circumstances, remained obligated to take 300 million cubic feet per day from Westcoast, managed to dispose of the balance of that gas in its own market areas (R. 497).

2. The collapse of the December 11, 1954, sale to El Paso led to a renewal of Pacific Northwest's efforts to market its gas directly in California. In June 1955, when the construction of the Pacific Northwest line was just getting under way, Ray Fish expressed an interest in seeing "the California door open for us in the future" (R. 804). Fish also recommended that the renegotiation of the Mountain Home contract be made the occasion for securing a "concession" from El Paso with regard to repayment of gas obtained pursuant to the "Exchange Gas Contract" of 1954, as well as a "lifting of all restrictions on the growth of Pacific" (*ibid.*).

In 1956 the company engaged in extended negotiations in an effort to consummate a sale of natural gas to the Southern California Edison Company ("Edison"). Edison, the largest industrial user of natural gas in Southern California, was a customer of the Southern Companies (see, *supra*, p. 5), which, in turn, obtained their supplies of gas from El Paso. Edison, however, was a low priority customer, and was permitted by the Southern Companies to take gas only on an "interruptible" basis, *i.e.*, subject to interruption during periods of peak demand for domestic uses (R. 140). Because of the preference of smog control authorities for gas as a fuel, it was unlawful for Edison to burn oil when gas was available, and the unpredictability of when gas

would be available made it impossible to forecast oil requirements. The result was that Edison was continually either oversupplied or undersupplied with oil (R. 139–140). The only escape from this predicament was to obtain a "firm"—*i.e.*, non-interruptible—supply of gas.

In January 1956, Edison attempted to interest El Paso in supplying its "firm" gas requirements, but was advised that it was El Paso's policy not to sell gas to anyone except a distributor, and that El Paso would not wish to interfere with its customer's business relations by undertaking to sell directly to the ultimate consumer (R. 140–141, 143–144, 568–569, 611–613).

Harold Quinton, Edison's chief executive, continued to look for a firm supply of natural gas and, at the suggestion of an executive of Phillips Petroleum Corporation, brought his problem to Ray Fish (R. 142–143). At a meeting on May 7, 1956, representatives of the two companies discussed a proposal whereby 300 million cubic feet of Canadian gas per day would be purchased by Pacific Northwest and taken into its system at the Canadian border, moved through its existing facilities and extensions thereof, and delivered to Edison at a point on the California-Oregon border. It was agreed that the economic feasibility of the contract would be a necessary condition to any firm obligation in the future, and that Pacific Northwest would explore the problem of acquiring the needed supplies, while Edison would address itself to the problem of furnishing an adequate market (R. 755–756, 615).

Although Edison alone was not in a position to absorb immediately the entire 300 million cubic feet necessary to support the project, Harold Quinton considered the proposal worth pursuing, since "it was the first concrete thing we had got hold of" (R. 1016).

One month later Edison received an offer from the Southern Companies to deliver to Edison 300 million cubic feet of gas per day, which El Paso was to obtain and transport for them from a Louisiana Gulf Coast source. This was the first offer Edison had ever had from them to supply a large quantity of gas over a long period of time (R. 144–145, 1023; 563–567; 619–620). On July 5, Edison rejected the offer unless certain modifications were made (R. 689–694). On July 16, 1956, however, the Southern Companies advised Edison that the Gulf Coast gas was no longer available to El Paso (R. 628–629).

During the pendency of the negotiations with the Southern Companies, Edison was also dealing with Pacific Northwest for the importation of Canadian gas. On June 22, Fish presented a firm proposal to supply to Edison 300 million cubic feet of gas per day at a point on the California-Oregon border south of Klamath Falls, Oregon (R. 620). Edison officials carefully balanced the advantages and disadvantages of the project, listing among its other strengths (a) "Large potential gas reserves without same degree of competition as Gulf Coast"; (b) "Potential reserves in Rocky Mountains tributary to system"; and (c) "Position [of Pacific Northwest] in field,

adjacent to future potential gas fields" (R. 622). On July 6, 1956, Edison advised Pacific Northwest that its requirements, initially at least, were considerably less than the 300 million cubic feet a day originally discussed, and that such an amount probably would not be required until 1965 (R. 624–625). After the collapse of the alternative "Gulf Coast" proposal, Edison indicated that its requirements would be increased by 150 million cubic feet a day [to a total of 225 million] since the additional gas expected to be brought to the Louisiana Gulf Coast from El Paso via the Southern Companies had now ceased to be available (R. 629–630). On July 30, 1956, Pacific Northwest and Edison entered into a tentative agreement for the sale of 300 million cubic feet of gas at the Oregon-California border (R. 635–638, 757). A separate agreement provided that Edison could terminate the arrangement prior to December 31, 1956, if it concluded that the proposal was not economically feasible, and that Pacific Northwest could terminate prior to that date in the event it could not acquire access to the reserves needed to support the proposal (R. 757). Shortly afterward, Westcoast contracted to supply Pacific Northwest with the required volumes (R. 830–831).

Although the withdrawal of the Gulf Coast gas made it possible for Edison to take additional volumes from Pacific Northwest (R. 628–630), Edison

deemed it essential, nonetheless, to secure the participation of the California distribution companies (the Southern Companies and/or Pacific Gas). These companies, it was hoped, would absorb a portion of the large volume necessary to justify the project, would share the cost of constructing an intra-state pipeline to bring the gas from the Oregon border to Southern California, and might also make the existing facilities available for that purpose (R. 1017–1025). Thus, shortly after the July 30 agreement was signed, Edison officials prepared a memorandum to the distribution companies, calling for an integrated system within California for distributing the Canadian gas to be supplied by Pacific Northwest (R. 630–631, 646–649), and expressing the view that "it is inevitable that another supply of gas must come into the State from the North, and we expect that that supply would grow materially over the years, and probably come eventually to equal the supply coming from the East" (R. 648). The proposal was presented to the Southern Companies on August 7, 1956 and to Pacific Gas on August 9, 1956 (R. 655, 656). The latter informed Edison that its own plans for a pipeline from Canada precluded its participation (R. 656); the Southern Companies, however, were sufficiently interested to request additional details (R. 645–646, 656). Edison responded to that request on August 21, 1956, indicating the savings that would result from joint operation of the new pipeline by Edison and the Southern Companies, and announcing that it planned to place an order for pipe within thirty days

"since the project will require a substantial amount of new pipe irrespective of the participation of the gas utilities'" (R. 651–652).

On the same day, August 21, Paul Kayser, the president of El Paso, called at Harold Quinton's office at Edison, announced that he had heard of the Edison-Pacific Northwest project, and (as reported by an Edison official in a confidential memorandum) indicated that he would protest and fight it to the last ditch (R. 656). Mr. Quinton testified that Kayser stated "that he was aware of the deal that [Edison was] working up with Mr. Fish, and that he felt that he could supply gas to us as well as anybody else could, and as cheap, and he expressed the thought that he wanted to hold the market there in Southern California, and was prepared to supply it, and that he would resist the efforts of anybody else to come in there" (R. 1036). During the course of the conversation Kayser made a verbal offer to sell Edison 150 million mcf of gas per day at the Arizona-California border at a price of 40¢ per mcf (R. 653–654). There followed, on August 24, 1962, a formal written proposal in which El Paso, "upon a re-examination of the cost of procuring the gas to supply your contract," reduced its price to 38¢ per mcf (R. 652–654). The offer acknowledged El Paso's original refusal to deal directly with Edison and explained that the Southern Companies "had changed their policy and raised no objection to my talking to you about the direct sale to you at the California border and that they would

be willing, for a reasonable compensation, to transport the gas for your account from the California border to your plants" (R. 652–654).

On September 5, 1956, the Southern Companies, replying to Pacific Northwest's letter of August 21, stated that they could more economically import additional gas into California "within the normal patterns of our supply operations," and that, unless there were material changes in Edison's proposal, it would be given no further consideration, at least for the time being (R. 655). The following day, the Southern Companies confirmed their willingness to transport the gas offered to Edison by El Paso (R. 696–697).

In order to induce the Southern Companies to participate in the Pacific Northwest project, Fish suggested certain publicity releases to be issued jointly by Edison and Pacific Northwest on September 20, 1956 (R. 832). On October 2, however, officials of Edison, El Paso, and the Southern Companies arrived at an agreement whereby El Paso would sell, and the Southern Companies transport, to Edison up to 100 million cubic feet of gas per day. During the course of the meeting, the price of 38¢ per mcf previously quoted by El Paso was reduced, first to 34¢ and finally to 30¢ (R. 674–676). In a letter of the same date, Edison terminated its preliminary agreement with Pacific Northwest (R. 661–662). On October 5, 1956, the arrangement between El Paso, Edison, and the Southern Companies was evidenced by a formal memorandum (R. 663–670), which, in

turn, was superseded by a later memorandum dated October 27, 1956 (R. 676–681).[4]

Subsequently, Pacific Northwest renewed its efforts to interest Edison, and also Pacific Gas in a project to import Canadian gas (R. 662, 835a–835c). On November 5, 1956, Pacific Northwest made a firm offer to deliver to Pacific Gas 350 million cubic feet of Canadian and Rocky Mountain gas per day (R. 835a–835c). On November 8, 1956, Pacific Northwest's directors accepted El Paso's stock purchase offer (see *infra*, p. 18). However, even after this crucial step in the merger of the two companies had been accomplished, Fish insisted that Pacific Northwest's separate negotiations with customers in the California market remain open (R. 835d). Moreover, a preliminary stock exchange agreement entered into between El Paso and Pacific Northwest on October 18, 1956, took note of the fact that Pacific Northwest was negotiating in the California market and would want the support of El Paso in such negotiations (R. 588).

C. THE ACQUISITION OF PACIFIC NORTHWEST BY EL PASO

El Paso's interest in acquiring Pacific Northwest began in 1954, the year in which Pacific Northwest obtained its original certificate and made its initial contract with Canadian suppliers (R. 122). Early in 1955 El Paso conducted studies of Pacific Northwest's

[4] This sales contract, which would have resulted in the sale of gas for boiler fuel on a firm basis, was subsequently disapproved by the Federal Power Commission. *El Paso Natural Gas Co.*, 22 F.P.C. 900.

system with a view to possible acquisition (see R. 570–577). On December 14, 1955, El Paso offered to exchange 5 shares of its stock for every 9 shares of Pacific Northwest stock (R. 584). The offer was rejected by Pacific Northwest's directors because of expected opposition to the acquisition both from the Federal Power Commission and from customers in Pacific Northwest's market areas, in addition to objections to the adequacy of the compensation offered by El Paso (R. 332–333).

Negotiations were renewed in the summer of 1956 and proceeded concurrently with Pacific Northwest's attempt to obtain a California outlet. At the time Kayser recommended the acquisition to El Paso's board of directors, he had already learned of the Pacific Northwest-Edison negotiations (R. 504). On October 24, 1956, Fish and Kayser reached a tentative agreement regarding the exchange of Pacific Northwest stock (R. 585–590). The final agreement, which was accepted by Pacific Northwest's Board of Directors on November 8, 1956, called for the exchange of 7 shares of El Paso stock for every 8 shares of Pacific Northwest stock and provided that the El Paso stock received by the Pacific Northwest shareholders would not participate in dividends for one year after the acquisition (R. 592). The El Paso stock given in the exchange had a market price of $140 million, while the equity of the stockholders of Pacific Northwest (excess of assets over liabilities) was shown on its financial statements as $28 million (R. 285, 286). By May 31, 1957, El Paso had acquired 99.8 percent of

the outstanding stock of Pacific Northwest (R. 28).

On July 22, 1957, the Department of Justice filed this action in the District Court for the District of Utah charging that El Paso's acquisition of the Pacific Northwest stock violated Section 7 of the Clayton Act. On August 7, 1957, El Paso applied to the Federal Power Commission, pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), for permission to acquire the assets of Pacific Northwest (R. 39–40). On December 23, 1959, the Commission issued an order granting certificates for the merger of Pacific Northwest into El Paso, and the merger of the two companies was effected on December 31, 1959 (R. 46, Fdg. 5). On April 30, 1962 this Court, in *California* v. *Federal Power Commission*, 369 U.S. 482, set aside the Commission's order authorizing the asset merger on the ground that the Commission should not have acted until the district court had determined whether the merger violated the Clayton Act. Meanwhile, on October 24, 1960, the United States had moved to amend the complaint so as to include the asset acquisition in the charge of violation of the Clayton Act (R. 42–43). The motion was granted on October 19, 1962 (R. 44).

II

THE PROCEEDINGS IN THE DISTRICT COURT

The evidence introduced at the trial was largely undisputed and consisted to a great extent of transcripts of testimony given before the Federal Power Commission and State regulatory agencies, exhibits

introduced before those bodies, and portions of the record before this Court in *California* v. *Federal Power Commission*, 369 U.S. 482. After oral argument Chief Judge Ritter ruled from the bench that judgment would be for the defendants, directed the defendants to prepare findings of fact and conclusions of law, and stated that he would not write an opinion (R. 277). The defendants submitted 130 findings of fact and one conclusion of law, all of which the court adopted verbatim (R. 45–72).

The exploration for and the production, transportation, and sale of natural gas was adopted by the court as the "line of commerce" for testing the legal effect of the merger under the Clayton Act (Fdg. 47). The United States proposed several alternative geographical areas as "section[s] of the country" within which to appraise the competitive effect of the merger on the distribution of natural gas. In this Court, however, the government's attack is directed solely to its anti-competitive effect in the California and Southern California markets. With respect to those markets, the district court found that although Pacific Northwest had attempted to sell Canadian natural gas to Southern California Edison shortly before the merger in 1956 (Fdgs. 90, 91), it had never actually made a sale (Fdg. 66), and, in view of its financial condition, probably could not have succeeded in selling gas in the California market at that time (Fdg. 94). The court further found that if Pacific Northwest had remained an independent entity, it could not in the future (a) have obtained a contract from the South-

ern Companies or from Pacific Gas and Electric; (b) have acquired or arranged for the necessary gas supplies, obtained the requisite financing or built the necessary pipeline facilities to support a feasible interstate project to California; (c) have put together an interstate project to serve California acceptable to the Federal Power Commission; or, in consequence, (d) have provided any substantial competition for the sale or transportation of natural gas in California or Southern California (R. 65–66, Fdgs. 97–101).

The court found that there was no evidence that El Paso had any anticompetitive purpose in acquiring Pacific Northwest (R. 54, Fdg. 40), and that the acquisition had the benefit of enabling El Paso (a) to improve its ratio of residue gas (gas produced in conjunction with oil) over dry gas (gas produced from wells independent of oil production) (R. 47, 50–51, 54, 68, 71; Fdgs. 9, 10, 26, 40, 115, 129), and (b) to extend natural gas facilities in the Northwest and to maintain lower rates than Pacific Northwest could have offered (R. 71, Fdg. 127).

The court also made findings as to developments in the California market since the commencement of the antitrust action. It found that the Transwestern Pipeline Company, pursuant to a 1958 gas purchase contract, is now delivering to the Southern Companies 300 million cubic feet of gas per day through a newly constructed pipeline from Texas; that in 1960 Pacific Gas Transmission Company, an affiliate of Pacific Gas and Electric, had constructed a pipeline to transmit Canadian natural gas supplies controlled by Pa-

cific Gas and Electric from the Canadian border to California; that both the above lines have excess capacity; that the Southern Companies had been exploring for natural gas reserves, and had obtained leases on 59,000 acres of promising gas lands, in the Rocky Mountain area; that an affiliate of Tennessee Gas Transmission Company had entered into an agreement to transport Texas gas to Edison through a proposed pipeline project pending before the Federal Power Commission;[5] that the so-called "Rock

[5] This project, known as the "Pemex" project, contemplated the transportation of 300 million cubic feet of Texas-produced gas and 75 million cubic feet of Mexico-produced gas through the Republic of Mexico for consumption in Edison's steam-electric power plant. Effective January [illegible], 1963, this project was withdrawn. On February 12, 1963, Gulf Pacific Pipeline Company, another subsidiary of Tennessee Gas Transmission Company, filed an entirely new application for certificate authorization to construct a 1400-mile pipeline at a cost of $314 million from Texas to Los Angeles (entirely within the United States) to transport up to 865 million cubic feet of gas per day, purchased directly in Texas by Southern California Edison and the Los Angeles Department of Water and Power. (*Gulf Pacific Pipeline Company*, CP 63-223.)

In its Opinion No. 393 (p. 21) issued on July 12, 1963 (see p. 23, *infra*, fn. 6), the Commission announced that it would institute a comparative proceeding to determine how the future needs for natural gas deliveries to Southern California may be met in a manner most conducive to the public interest. Accordingly, the Commission has consolidated the Gulf Pacific application (CP 63-223) with the subsequently filed applications of two competing pipelines, Transwestern Pipeline Company and El Paso, both of which also seek authorization to serve the Southern California market.

Transwestern has two applications pending in that proceeding. One (CP 63-204) proposes a $5 million addition to its existing pipeline so as to increase daily deliveries to the Pacific Lighting Gas Supply Co. (parent of the Southern Companies)

Springs" project (involving the collaboration of El Paso and Colorado Interstate Gas Company)—also then pending before the Commission, but subsequently rejected*—contemplated the delivery of 400 million cubic feet per day to the Southern Companies; and that in light of these developments, there was no reasonable probability that El Paso would be able to make further sales in California or that Pacific Northwest, had it remained independent, would have been able to do so (R. 61–63, Fdgs. 79–84, 87).

ARGUMENT

INTRODUCTION AND SUMMARY

This important antitrust case, involving the merger of two major natural gas pipeline companies, is a sequel to *California* v. *Federal Power Commission*, 369 U.S. 482. There, this Court held that the Power

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from 300 million cubic feet to 350 million cubic feet by the end of 1963. The other application (CP 64–91) seeks authorization to increase Transwestern's sales to Pacific Lighting from 350 million cubic feet per day to 640 million cubic feet per day by 1967 and, for that purpose, to construct additional facilities (compression units, 24-inch loop, and small diameter line) at a cost of $39.5 million.

El Paso's application (CP 64–76) proposes to construct a new 583-mile pipeline (as well as other facilities) at a cost of $134 million and to deliver additional gas totalling 575 milion cubic feet per day to the Southern Companies. (See, *infra*, pp. 33, 48.)

* On July 12, 1963, the Federal Commission denied El Paso's application for the Rock Springs project. *El Paso Natural Gas Co.* (Op. No. 393), Docket No. G–16235.

Commission had acted improperly in passing upon the proposed acquisition by El Paso of Pacific Northwest's assets while the validity under the antitrust laws of the prior acquisition of Pacific Northwest's stock was under attack in the district court. Here, the United States seeks review of the district court's holding that the merger did not contravene Section 7 of the Clayton Act, which prohibits acquisitions—

> where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

The heart of our argument is that El Paso's purchase of the assets of Pacific Northwest was, on the undisputed facts, an acquisition the effect of which "may be substantially to lessen competition" in the interstate transportation and sale of natural gas in California. The production, transportation and sale of natural gas is manifestly a relevant line of commerce. California is a "section of the country" within the meaning of Section 7. The critical question, therefore, is whether the acquisition had sufficient tendency to lessen competition on the undisputed facts or is saved by the district court's findings that Pacific Northwest, as an independent entity, could not have obtained a contract from the California distribution companies (R. 65, Fdg. 97), secured the gas supplies and financing necessary to support a feasible pipeline project to California (R. 65, Fdg. 98), or

put together a project acceptable to the Federal Power Commission (R. 66, Fdg. 99).

At the time of the acquisition El Paso, with assets of nearly a billion dollars, was one of the largest pipeline companies in the United States. It was the only actual supplier of out-of-State gas to the vast and still expanding California market, where most of its sales were concentrated. At that time Pacific Northwest, with assets of $250 million, was the only other important interstate pipeline company west of the Rocky Mountains. Although new, by the time of the acquisition Pacific Northwest was a large going concern, whose natural territory included the same vast and growing California market that El Paso had always dominated. Even if Pacific Northwest never actually sold a cubic foot of natural gas in California, it was, and would have continued to be, a substantial competitive factor *vis a vis* El Paso in the California market. For competition among pipeline companies in this regulated industry consists not of rivalry in making numerous repetitive sales for early delivery, but largely of putting together for submission to the Federal Power Commission new projects looking to large scale future deliveries meeting anticipated demand over a substantial period, often through facilities to be enlarged or constructed for the purpose. Whether the structure of a market for the sale of natural gas to local distributors is competitive or monopolistic depends upon the number of going

concerns to which the distributors, and through them the consumers, may look for efforts to develop such projects.

In this sense Pacific Northwest was a substantial factor in the California market at the time of the acquisition. Its officers had been actively negotiating for the contracts. That an independent Pacific Northwest would have continued to be interested in the California market is also probable. That conclusion is not only a fair inference from the events just prior to the merger but it is implicit in the logic of the situation. California was a vast and expanding market. Pacific Northwest, a going concern with a uniquely-located pipeline system, had ready access to three major producing areas—Canada, the Rocky Mountains and the San Juan Basin—as well as the California market. The opportunities open to independent concerns are shown by the number of projects subsequently put forward.

The acquisition, we submit, should have been held to violate Section 7 upon proof of the foregoing facts without speculating about whether Pacific Northwest actually would have sold gas in California. The district court's findings upon that point are irrelevant. No one could say with any degree of reliability whether Pacific Northwest would or would not be able to work out the necessary contracts and financing, and then secure the approval of the Federal Power Commission. Even if it failed, its inde-

pendent presence and the effort it made would in all probability put competitive pressure upon El Paso. Section 7 is concerned with the structure of the market, with the number of concerns seeking to fill business opportunities, not—in the case of going concerns—with their likelihood of success. El Paso, prior to the inception of Pacific Northwest, had enjoyed a virtual monopoly of the California market. Pacific Northwest had sought to challenge it, not without apparent effect upon El Paso's policies. El Paso's acquisition of such an aspiring rival eliminated the very kind of competitive pressure that Section 7 is intended to preserve.

EL PASO'S PURCHASE OF THE ASSETS OF PACIFIC NORTHWEST WAS, ON THE UNDISPUTED FACTS, AN ACQUISITION THE EFFECT OF WHICH "MAY BE SUBSTANTIALLY TO LESSEN COMPETITION" IN THE INTERSTATE TRANSPORTATION AND SALE OF NATURAL GAS IN CALIFORNIA

A. COMPETITION IN THE REGULATED NATURAL GAS INDUSTRY CONSISTS OF RIVAL EFFORTS TO OBTAIN NEW CONTRACTS AND PROMOTE PROJECTS FOR THE SATISFACTION OF NEWLY EMERGING DEMAND, SUBJECT TO APPROVAL BY THE FEDERAL POWER COMMISSION

In most industries it is convenient to think of competition as rivalry in offering goods for sale and early delivery in a stream of recurrent individual transactions with a sizeable number of purchasers. Each competing seller is engaged in a continuous, day-to-day struggle to hold the customers he has, to take customers away from his rivals, and to attract

his share of the customers newly entering the market. Since the transactions rarely bind the parties to long-term commitments, the entire market demand for the product at any given time, not merely the incremental demand, is fair game for competition.

The conditions of competition are quite different in the natural gas industry. The construction of a natural gas pipeline requires so large an investment that it cannot be undertaken without assurance of a substantial and long-continuing demand for the gas which will flow through it. Accordingly, the typical contract for the sale of gas by a pipeline company to a local distribution company (or retail industrial customer) is a major transaction, calling for the delivery of large volumes (sometimes hundreds of millions of cubic feet per day) for a protracted period of time (usually 20 years). Moreover, such transactions, though large in scale, are few in number—both because there are comparatively few wholesale purchasers of natural gas[1] and because sales to any given purchaser are infrequent. It is not uncommon for the entire house-heating gas requirements of a community or group of communities to be satisfied under a single contract or small group of contracts. And while the frequency of the transactions depends largely upon the rate of population growth in the

[1] In California, for example, there are only two significant wholesale purchasers, Pacific Gas in the north and the Southern Companies in the south.

particular market area, even in the most dynamic area the intervals between sales are normally measured, not in weeks or months, but in years.

After the parties to an interstate sale of natural gas have struck their bargain, the contract must be submitted to the Federal Power Commission, which controls entry into the market by granting or withholding authorization to construct facilities or to sell or transport gas in interstate commerce (15 U.S.C. 717f). Unless the pipeline has existing excess capacity at its disposal, it must obtain the Commission's approval not only to sell and transport the gas, but also to construct the facilities necessary for that transportation. Only when those related authorizations have been obtained may the applicant proceed to install its line and commence service.

Once a sale is negotiated by the parties and certificated by the Commission, the substantial segment of market demand satisfied by that agreement is withdrawn from the market at least for the life of the long-term contract (and probably for the life of the reserves dedicated to the contract). That segment of demand, as the court below found, "by law, is no longer subject to competition by other pipelines" (R. 57, Fdg. 53). A point to be emphasized, therefore, is that competition in this industry does not relate to demand which has been already "spoken for," *i.e.*, served by existing facilities under long-term contracts executed in the past; it takes the form of rival efforts

to put together projects and obtain new contracts with a view to satisfying new increments of demand as they emerge. Such competition may occur at either or each of two stages: First, pipelines may vie with one another to strike a bargain with the purchaser for large scale future deliveries. Second, a contract having been obtained, the competitive process continues until one or the other of the rival pipelines, possibly as a result of a comparative hearing, has received final approval of the Federal Power Commission.

These characteristics of the natural gas industry have several important implications for the present case:

(a) In considering whether a pipeline company is a substantial competitive factor in a given area, it is not greatly relevant whether it has already acquired a "share of the market" by making previously certificated sales to that area. A natural gas company becomes a "competitor", not by virtue of the deliveries it makes pursuant to long-term contracts obtained in the past, but by vying for the opportunity to supply new and unserved increments of demand in the future. The point was impliedly recognized by the court below in its findings concerning El Paso's wholly-owned subsidiary, Utah Natural Gas Company. For even though the record showed that Utah Natural and Pacific Northwest were both substantial suppliers of the same customer (the distribution company serving Salt Lake City) and even though they

supplied 23.7 percent and 21 percent respectively, of the State's total requirements in 1957 (GX–15, App. B, *infra*)* the court found that there was no reasonable likelihood that the El Paso subsidiary "would compete in the state of Utah for any other sales than its existing contract sales to Mountain Fuel" (R. 57, Fdg. 58) and hence, presumably, that it was not engaged in competition with Pacific Northwest despite the concurrent deliveries to the same buyer. But the court ignored this characteristic of competition in the industry when it came to the California market.

Nor does the competitive status of a natural gas company depend upon whether its existing pipeline facilities reach the relevant market area. In most industries, to be sure, an entrepreneur must construct a facility (be it factory, warehouse, or store) capable of serving an area before he can begin to solicit business there; so long as he lacks such a facility, it is usually fair to assume he is not yet a competitor in that market. By contrast, a natural gas company, except to the extent its system has excess capacity, must compete for, enter into and obtain FPC approval of important sale contracts *in advance of constructing the pipeline facilities* through which the contract volume will travel. Indeed, the possession of existing pipeline facilities, if committed to capac-

*This table is part of the record on appeal, but through oversight we did not designate it for printing. For the Court's convenience, it is reprinted in Appendix B, *infra*, p. 66.

ity in fulfilling existing long-term contracts, is of no advantage to a company in the competitive struggle for new sales. In the proceedings below, for example, El Paso took pains to emphasize, and the court found, that "El Paso has no advantage over its competitors to supply future market demands for interstate natural gas in California or any part thereof, and in various respects is at a competitive disadvantage. In order to compete to supply such new demand, it would be necessary for El Paso to acquire new and additional supplies of reserves of natural gas and to make feasible arrangements to construct new pipeline facilties * * *" (R. 63, Fdg. 87).

This is not to say that the existence of a pipeline system in an area does not influence a company in seeking markets or give it advantages, especially where it has uncommitted capacity, in the race to enter those markets. Our point here is simply that an existing pipeline connection and prior sales are by no means indispensable to offering effective competition.

That the ability of a company to compete for the right to serve new market demand does not depend upon whether it has made sales or constructed a pipeline to the market in the past is well illustrated by the current competitive situation in California. At present there is pending before the Federal Power Commission a comparative proceeding (*Gulf Pacific Pipeline Company, et al.*, CP 63-223, et al.) to deter-

mine the most desirable method of meeting Southern California's future needs (see, *supra*, pp. 22–23, fn. 5); *infra*, p. 4[illegible]). Of the three companies which have field competitive applications in that proceeding, one (Gulf Pacific, a subsidiary of the Tennessee Gas Transmission Company) has never before sold or transported natural gas to California, and now proposes to build a 1400-mile pipeline, at an estimated cost of $314 million, in order to do so. Another (El Paso), though presently the largest interstate supplier to the California market, has made no certificated sale in California since 1957, has no existing facilities which could be used for the purpose of meeting additional demand, and now proposes to construct 583 miles of mainline pipeline, at an estimated cost of $134.2 million, in order to supply California's anticipated incremental requirements. Only the third applicant, Transwestern Pipeline Company, currently has excess capacity available for serving the new demand. No one would contend that Tennessee Gas (or its subsidiary) was any less a competitive factor than its rivals merely because it had never delivered gas to California in the past, or that El Paso was not a full-fledged competitor merely because, in order to make a further sale, it would be required to invest large sums to build a new pipeline. By the same token, Pacific Northwest's position as a competitive factor was not impaired by the fact that it had never sold gas to California.

(b) There is no clearcut distinction between "actual" and "potential" competition in the natural gas industry. This is true (i) because in this industry "actual" competitors include all pipelines engaged in seeking new contracts to supply the incremental needs of the area, not merely those which already serve the market under existing long-term contracts; and (ii) because the pursuit of new competitive opportunities is necessarily intermittent, rather than a continuous, activity. Unsatisfied increments of demand sufficient to justify the construction of new pipeline facilities are not everpresent, but accumulate over a period of time; as a result, competition for the right to supply those increments is also apt to be visible only periodically. One having lost out to a competitor in the race to serve a particular segment of demand, a pipeline company, however eager to make a sale, may have to bide its time for many months before the occasion will be ripe for another attempt. Whether in the interim it ceases to be an "actual", and becomes merely a "potential", competitor is a matter of definition upon which nothing turns. It is unprofitable, therefore, to inquire which of the two categories Pacific Northwest belonged to after the collapse of its 1956 negotiations with Edison (*supra*, pp. 10–17; *infra* pp. 36–38); in either case, Pacific's 1956 proopsal, and its manifest purpose to offer new proposals in the future, made it a competitive factor in the fullest sense.

(c) In a Section 7 case involving interstate pipeline companies, there is unlikely to be any issue as to the quantitive substantiality of the competition foreclosed by the merger. Certainly there is none here. Such a company is, by its very nature, a sizeable enterprise supplying substantial quantities of a basic commodity for ultimate use by thousands of consumers. Moreover, the number of pipelines contending for sales in any given area is certain to be small, a fact which tends to make each company an important competitive factor irrespective of its size or share of the market. In the present case, for example, Pacific Northwest was the only interstate competitor El Paso had; today it would be one of only four interstate companies seeking to serve California, the nation's largest market. The contract Pacific Northwest sought to negotiate with Edison in 1956 (*supra*, pp. 10–13) contemplated the delivery of 300 million cubic feet of gas per day (*i.e.*, roughly 100 billion cubic feet per annum) beginning in 1959; that single transaction, if completed, would have made Pacific the supplier of roughly 9 percent of the gas consumed in California in 1959 (as compared to El Paso's 62 percent) (R. 377). In short, if the acquisition challenged here had the effect of foreclosing any reasonably probable competition, that competition necessarily was quantitatively "substantial."

It is in the light of these economic realities of the natural gas industry—the absence of continuous day-to-day attempts to sell to particular customers, the small number of customers and actual sales, and the

basic unimportance of whether the pipeline has made past sales in the area—that the effect upon competition of the elimination of Pacific Northwest as an independent entity must be judged.

B. PACIFIC NORTHWEST, AS AN INDEPENDENT CONCERN, WOULD BE A SUBSTANTIAL COMPETITIVE FACTOR IN PROMOTING PROJECTS FOR THE SATISFACTION OF NEWLY EMERGING DEMANDS IN THE CALIFORNIA MARKET

1. Pacific Northwest, prior to the merger, had been engaged in promoting projects for future deliveries of gas in California

The undisputed evidence establishes that Pacific Northwest was, at the time of merger, an important competitive factor in the California market. Almost from its inception Pacific Northwest was actively promoting negotiations for new projects furnishing California with new sources of out-of-state gas, for which it had previously been dependent exclusively upon El Paso. As early as 1954, the year in which its line was certificated by the Federal Power Commission, Pacific Northwest drew up plans for the transportation of Canadian gas to California and conducted negotiations on that subject with Pacific Gas (*supra*, pp. 7–8). Finally, in the summer of 1956, a few months prior to the acquisition, Pacific made a sustained effort to negotiate a sale of substantial proprotions to Southern California Edison, the State's largest industrial user of natural gas (*supra*, 10–17).

The 1956 negotiations and El Paso's subsequent course of conduct demonstrate the importance of Pacific Northwest's independent presence west of the Rocky Mountains. In January of 1956, Edison, needing a "firm" supply of natural gas in order to reduce

and stabilize its intake of smog-creating fuel oil, made overtures to El Paso, only to be told that El Paso's policy was to deal exclusively with distribution companies and not with their retail customers (*supra*, p. 11). At that point, Edison turned to Pacific Northwest. In early May, representatives of the two companies discussed, and agreed to explore further, a proposal whereby Pacific Northwest would supply Edison with 300 million cubic feet of Canadian gas per day at a point on the California-Oregon border. While the project was dependent upon the participation of one or both of the distribution companies (Pacific Gas or the Southern Companies) to absorb a portion of the supply, Edison considered it the "first concrete thing we had got hold of" and as "something worth pursuing" (R. 1016). On June 7, the Southern Companies offered Edison a firm supply of gas from the Louisiana Gulf Coast area, which El Paso was to purchase in the field and bring to California (*supra*, p. 12). That proposal was withdrawn on July 16, when the gas was sold to another pipeline. Meanwhile, even with this promising alternative seemingly available, Edison continued to give serious consideration to the Pacific Northwest project, weighing it against the other possibility and noting among its advantages the proximity of the Pacific Northwest system to large potential reserves and potential new gas fields (R. 622). On July 30, Edison and Pacific Northwest formalized their understanding by executing a detailed, though tentative, agreement along the lines

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previously discussed. As steps toward implementation, Pacific Northwest proceeded to contract for the Canadian supplies, while Edison attempted to enlist the cooperation of the distribution companies (*supra*, p. 13). On August 21, El Paso's president, who had earlier refused to deal directly with Edison, called upon Edison's president and made a competitive offer to supply Edison's requirements, announcing "that he was aware of the deal that [Edison was] working up with Mr. Fish * * * that he wanted to hold the market there in Southern California, and was prepared to supply it, and that he would resist the efforts of anybody else to come in there." (R. 1036).

The bold and elaborate project contemplated by the Pacific Northwest-Edison arrangement eventually foundered because of the refusal of Pacific Gas and the Southern Companies to participate. But that does not alter the fact that for a period of roughly four months—a period which also encompassed the first preliminary negotiations leading to the stock acquisition (*supra*, pp. 13, 14)—Pacific Northwest was engaged in a vigorous competitive bid for a customer which would otherwise have had to depend solely on El Paso for its out-of-state gas. Moreover, Pacific's effort, though unsuccessful, was not without influence upon El Paso's own conduct in the market. For in offering Edison an alternative source of supply, it encouraged El Paso to change its established policy of refusing to deal directly with users, and to make Edison a series of offers at progressively lower prices (*supra*, p. 15).

Had the stock acquisition been consummated a few months earlier, extinguishing Pacific Northwest as an independent entity at a time when its negotiations with Edison were still in progress, there could be no doubt that substantial and existing competition would have been eliminated. In that situation, no amount of speculation as to the probable fate of the competitive venture foreclosed by the merger could possibly have served to vindicate it under Section 7. There is no occasion for a different result, we submit, merely because Pacific Northwest's initial attempt to break into the California market had already miscarried as of the date of the acquisition. For Pacific's ambition to serve California survived the collapse of the Edison project. Indeed it remained strong and active up to the very moment of the acquisition. In a memorandum dated October 18, 1956, which summarized a meeting at which terms of acquisition were negotiated, it was recited that Pacific Northwest had substantially concluded contracts for the purchase of Canadian gas and that "Pacific plans on selling this additional volume of gas to the California market" (R. 588). Again on November 5, 1956, just three days prior to the day on which its directors agreed to the stock exchange with El Paso, Pacific Northwest made a firm offer to supply Pacific Gas up to 350 million cubic feet per day for twenty years (R. 835a–835c). And even after the stock exchange had been approved, Pacific Northwest continued to deal separately with the California markets in order to assure that, if its arrange-

ments with El Paso collapsed, it would still have the potential of serving those markets (R. 835d).

2. Since California was a natural market for an independent Pacific Northwest, the continuation of such competitive activity was probable

(a) *Pacific Northwest needed new markets to absorb and finance the development of its large potential gas reserves*

There is every likelihood that Pacific Northwest, had it remained an independent entity, would have persevered in the effort to consummate sales of gas to California. Indeed, Mr. Fish, its chief executive, explicity so testified (R. 743). Moreover, important economic considerations would have made it almost imperative that an independent Pacific Northwest expand its system to embrace new markets. The acquired company controlled or had access to an abundance of promising, though undeveloped, natural gas reserves. Its basic difficulty was that the demand for natural gas in its certificated market area (Washington, Oregon, and Idaho) was not keeping pace with these supplies or generating the revenues needed to finance the formidable costs of drilling and developing its reserves (R. 900–905). The most obvious way to extricate itself from this position and the one seized upon by Ray C. Fish, was to "sell more gas," *i.e.*, to add new loads to the system by reaching out for new market areas (R. 743, 761, 787). In furtherance of that purpose, Mr. Fish had embarked upon a search for markets both in the Chicago area (R. 743, 787) and in the Rocky Mountains. Indeed, Pacific's quest for markets brought it into direct con-

frontation with El Paso in Utah, where both companies (El Paso through a subsidiary) were substantial suppliers of the same customer (the distribution company serving Salt Lake City), and accounted for 21 percent (Pacific) and 23.7 percent (El Paso) of the total gas supplies consumed in the State in 1956 (*supra*, p. 31).

(b) *Pacific Northwest was a going concern with a pipeline accessible both to the California market and to important producing regions*

But it was the insatiable California market—growing, in pace with population, at an annual rate of 200 million cubic feet per day (R. 63, Fdg. 86)—which held, and would have continued to hold, the greatest promise. Pacific Northwest possessed unique qualifications for serving that vast market. First among these, of course, was the proximity of its pipeline both to the northern and southern California centers of demand. At Rock Springs, Wyoming, the Pacific Northwest line passed within 550 miles of the California border at possible delivery points convenient to both major sectors of the market (R. 106–107). At Twin Falls, Idaho, the distance was even shorter. And from points in Oregon, such as Portland or The Dalles, a 250 mile extension of Pacific's line would have reached the northern border of California (see map facing R. 895). The investment required to construct such an extension would have been much less than that entailed in the installation of a new 1200- or 1400-mile pipeline from the gas fields of Texas.*

* Pacific's 1956 arrangement with Edison contemplated the construction of an extension line from The Dalles, Oregon, to the northern border of California at Klamath Falls, Oregon.

And since the volumes delivered by Pacific Northwest in the years following the acquisition were substantially less than the certificated capacity of its line (R. 893, 900), the existing facilities could have been utilized, in conjunction with the necessary extensions, to move Canadian gas to California.

Even more important, Pacific Northwest, anchored to the San Juan Basin to the south, was at the same time the only pipeline connected with or readily accessible to the newly explored and fast-developing gas-producing regions of the Rocky Mountains and western Canada. El Paso's Annual Report of 1957 stated that, as of the end of that year, 1.59 trillion cubic feet of gas reserves in the Rocky Mountain-producing area and 2.33 trillion cubic feet in Canada were committed to Pacific Northwest under long-term purchase contracts (R. 892). Both of these areas hold the promise of enormous untapped reserves, and both were looked upon, not only by El Paso, but also by the Southern Companies, as important sources of future supply (R. 99, 171, 172, 216, 714–715, 892).

It was precisely these advantages—proximity to the California market and access to Canadian and Rocky Mountain reserves—which El Paso valued in Pacific

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It was estimated that the additional facilities required to accommodate additional delivery volumes of 300 million cubic feet per day from Canada would be approximately $76 million, and to accommodate 500 million cubic feet per day, $107 million. These figures should be compared with the $191 million expended by the Transwestern Pipeline Company in constructing its recent pipeline from Texas (R. 61–62, Fdg. 79), and with the $314 million proposed to be expended by the Gulf Pacific Pipeline Company, a Tennessee Gas affiliate, in constructing its proposed line from Texas to Los Angeles (*supra*, p. 22, fn. 5).

Northwest, which induced it to acquire Pacific Northwest's stock at a substantial premium (R. 259, 285–86, 491) and which it subsequently made continuing efforts to exploit. Thus, the trial court found that El Paso's purpose since the end of 1954 in seeking to acquire Pacific Northwest was to obtain additional gas supplies and reserves to enable it to serve its certificated market (California), and to that end, to "acquire Pacific Northwest's gas reserves and gain access to gas producing areas in the Rocky Mountains and Canada" (R. 54, Fdg. 40).

The efforts which Pacific Northwest would have made as an independent company to market its Canadian and Rocky Mountain gas in California can be inferred from the fact that El Paso, even with other alternatives open to it, has on two occasions since the merger advanced proposals looking to the transmission of Canadian gas to the California market through facilities to be constructed as offshoots of the original Pacific Northwest line. In 1957, Pacific Northwest, by then a wholly-owned subsidiary of El Paso, purchased an additional 400 million cubic feet of Canadian gas and agreed to deliver it to El Paso at Twin Falls, Idaho; El Paso, in turn, contracted to deliver the gas to the Southern Companies at a border point near Las Vegas, Nevada, through a line running off the Pacific Northwest facilities at Twin Falls (R. 208). There followed a prolonged delay in obtaining the necessary export permit from the Canadian authorities, and although a permit was eventually issued in 1958 to export 150 million cubic feet, the parties had by that time abandoned the Twin Falls venture in favor of a new project—the so-called

"Rock Springs" project—involving the collaboration of El Paso, Pacific Northwest (El Paso's subsidiary until the Power Commission approved the asset merger, at which time it became the Pacific Northwest Division), and Colorado Interstate Gas Company (R. 207–213).

This project—ultimately rejected on July 12, 1963 by the Federal Power Commission (*supra*, p. 23, fn. 6)—contemplated the construction (in part by El Paso and in part by Colorado Interstate) of a 500-mile pipeline from a connection on Pacific Northwest's line at Rock Springs, Wyoming, to the California border (R. 107), and the transmission to the Southern Companies of more than 400 million cubic feet of gas, to be supplied in equal parts by Colorado Interstate and Pacific Northwest (R. 210–216). One-half of Pacific Northwest's quota of 200 million cubic feet per day was made available by the release by Colorado Interstate of gas committed to it by Pacific Northwest under a long-term purchase contract executed prior to the stock acquisition (R. 212, Fdg. 83). This contribution to the Rock Springs project—100 million cubic feet per day—came, therefore, from reserves controlled by Pacific Northwest when it was still an independent company. El Paso's president intimated in his testimony, moreover, that the remaining portion of Pacific Northwest's quota might come from the 150 million cubic feet per day supply which Pacific Northwest had arranged to import from Canada in connection with the Twin Falls project (R. 216). Thus, the Rock Springs project utilized none of El Paso's own pre-merger pipeline facilities, and drew upon few, if any, of its pre-merger gas reserves.

It depended substantially, however, upon the facilities and reserves of Pacific Northwest, and, if certificated, would have brought to the California market large supplies of natural gas (including, probably, Canadian supplies) which Pacific Northwest controlled, or could have obtained, as of the time of the merger.

Thus, Pacific Northwest's formidable geographical position opened to it a wide range of opportunities which El Paso, after the merger, diligently exploited. Had Pacific Northwest remained an independent company, there is every likelihood that it, rather than El Paso, would have pursued these opportunities; that it, rather than El Paso, would have undertaken projects similar to the Twin Falls and Rock Springs projects.[10] Such endeavors to gain a foothold in the California market would clearly have constituted "competition" within the meaning of the Clayton Act, even if ultimately they might not have succeeded. The probable impact of those efforts upon El Paso, the sole existing supplier, is indicated by its reaction to Pacific Northwest's prior proposals. By closing the door to renewal by an independent Pacific Northwest of its projects to provide a second source of out-of-state gas, the acquisition tended substantially to lessen competition in violation of the Clayton Act.

[10] We do not say that an independent Pacific Northwest could have put together a project *identical* to El Paso's Rock Springs venture. As an element of that project, El Paso was required to take 175 million (later reduced to 100 million) cubic feet of gas per day from Colorado Interstate in the latter's Panhandle Field in Texas (R. 215). In its Motion to Affirm, El Paso properly points out (p. 20) that Pacific Northwest had no facilities so located as to receive this gas.

(c) The interest of other pipelines in developing projects for supplying the emerging California demand shows the opportunities open to Pacific Northwest as an independent competitor

The developments in the California market subsequent to the commencement of the present action do not negate, but confirm, our contention that there were ample opportunities for an independent concern such as Pacific Northwest to sponsor projects in competition with El Paso. Summing up those developments, the court below found that California is now served by two interstate pipelines in addition to El Paso—one constructed by the Transwestern Pipeline Company to bring gas from Texas to the Southern Companies, and the other constructed by Pacific Gas Transmission Company (a subsidiary of Pacific Gas) from the Canadian border to serve its parent; that both new lines have excess capacity; that the Southern Companies are now exploring for their own gas reserves in the Rocky Mountain region; that Edison has contracted to take gas from Gulf Pacific Pipeline Company, a subsidiary of Tennessee Gas Transmission Company, through a proposed pipeline project now pending before the Federal Power Commission; and that El Paso's own direct sale of gas to Edison in 1956 was rejected by the Power Commission in 1959 on the ground that the use of natural gas for boiler fuel was an "inferior end use." (R. 61–65; Fdg. 79–81, 86, 95.)

These considerations led the court below to the conclusion that Pacific Northwest would probably not have succeeded in making a sale in California. That conclusion, whatever its plausibility, is beside the point, as we later show (*infra*, pp. 49–59). The more

pertinent conclusion to be drawn from the recent events is that California has continued to be a dynamic and fertile source of competitive opportunities for an independent pipeline company. But for the merger, Pacific Northwest might well have vied with Transwestern for the opportunity to supply the Southern Companies. Moreover, Pacific Northwest had already offered and assuredly would have offered again to furnish Edison the gas now proposed to be delivered by Tennessee Gas Transmission and its subsidiaries. The fact that the Power Commission refused in 1959 to grant El Paso a certificate authorizing a direct sale of gas to Edison for use as boiler fuel does not preclude the possibility that it would have acted favorably upon a similar application by Pacific Northwest. The Commission's 1959 disposition did not deter Tennessee Gas from making, and seeking Commission approval of, an agreement to supply Edison's firm boiler-fuel requirements. Moreover, the Commission might well have declined to apply its "inferior end use" doctrine in the case of a project utilizing a Canadian, rather than a domestic, natural resource. Indeed, Mr. Fish counted on that very distinction in his discussions with Edison in 1956 (R. 619). Similarly, Pacific Northwest had reserves and facilities in the Rocky Mountain area where the Southern Companies have begun exploration.

Developments subsequent to the decision below indicate even more clearly the important role which an independent Pacific Northwest might have played in the California market. To be sure, on July 12, 1963, the Federal Power Commission denied El Paso's application for the Rock Springs project, partly on the

ground that California requirements, for the present at least, were satisfied by existing supplies. *El Paso Natural Gas Company, et al.*, Docket No. G–16235, et al. (Op. No. 393). However, in its order rejecting El Paso's Rock Springs project, the Power Commission announced that Southern California would require substantial additional supplies beginning in 1968, and that it would institute a comparative proceeding to consider alternative methods of serving that need. *El Paso Natural Gas Company* (Op. No. 393), *supra*, pp. 8, 21. Among the possible methods mentioned by the Commission was "a line from the Rocky Mountain area to California." Applications have been filed in this consolidated and comparative proceeding (styled *Gulf Pacific Pipeline Co., et al.*, CP–63–223, et. al.) by three pipelines: Gulf Pacific Pipeline Co. (a subsidiary of Tennessee Gas Transmission), whose application (a successor to the original "Pemex" project, R. 62, Fdg. 80; see, *supra*, p. 22, fn. 5) seeks authority to construct a pipeline to bring Texas gas to Edison; El Paso, which proposes to construct a new southern line from the San Juan Basin; and Transwestern, which seeks mainly to increase deliveries through its existing facilities (*supra*, p. 22, fn. 5).

Had it remained independent, Pacific Northwest would undoubtedly be one of the concerns contending with El Paso in the current proceeding before the Federal Power Commission for the right to serve the next major increment of unsatisfied demand in Southern California. And Pacific Northwest would have been the only company able to offer supplies from the Rocky Mountain and Canadian regions ~~an unequal~~ a unique capability which would have greatly enhanced Pacific

Northwest's competitive importance, for the Commission had specifically mentioned a line from the Rocky Mountain area as one of the possible sources of the necessary gas.

The entry of other concerns into competition for the California market undoubtedly had some tendency to reduce the chance that Pacific Northwest would be the successful entrepreneur. But in this industry the effect of an acquisition upon competition, as we show in the next section, depends upon the presence of competing entrepreneurs not upon the certificated sales. There are three concerns including El Paso, which by the acquisition has taken over the advantages of Pacific Northwest, competing for certification to supply the next major increment of demand in California. Only one may prevail. Nevertheless, the presence of the others is exceedingly important both because of the pressure they exert upon one another and because of the alternatives the rivalry brings before the regulatory agency. If Pacific Northwest were independent, there would be a fourth competitive factor at the critical stages even if only one could succeed.

C. THE DISTRICT COURT ERRED IN SPECULATING AS TO THE ABILITY OF PACIFIC NORTHWEST TO SUCCEED IN COMPETITION IN THE CALIFORNIA MARKET

The district court did not deny the eagerness of Pacific Northwest to gain entry into the California market or the likelihood that, if independent, it would persist in the effort.[11] The court based its decision

[11] At least it did not do so explicitly. And, in view of the fact that the court below made 130 detailed findings, no such denial should be implied. Had one been made, moreover, it would have been clearly erroneous.

upon its prediction that an independent Pacific Northwest would not have captured a share of the California market by making actual sales. It found:

> [1] There is no evidence that Pacific Northwest had it remained as a separate and independent entity, could have in the future obtained a contract from the Southern California Companies, P.G. & E. or both, for a natural gas pipeline project to California. [Fdg. 97, R. 65]
>
> [2] Pacific Northwest had it remained a separate and independent entity, could not in the future have acquired or arranged for the necessary gas supplies, obtained the requisite financing and built the necessary pipeline facilities to support a feasible interstate natural gas project to California. [Fdg. 98, R. 65]
>
> [3] There is no evidence that Pacific Northwest had it remained as a separate and independent entity, could have put together an interstate natural gas project to serve California acceptable to the Federal Power Commission and the California Public Utilities Commission. [Fdg. 99, R. 66]

The meaning of these findings is not free from doubt. If Chief Judge Ritter meant to say that there was no possibility that Pacific Northwest would ever make a certificated sale of gas to California, *i.e.*, that failure was *certain*, the findings are plainly erroneous. At the very least, as we have shown, the record establishes a realistic basis for concluding that Pacific Northwest might well have succeeded in linking the gas-rich regions of the Rocky Mountains and western Canada to the gas-hungry markets of California. It is more plausible, therefore, to construe the findings were intended as judgments of probability—*i.e.*, that

there was no reasonable likelihood that Pacific Northwest would gain its ends. Qualified in that way, and viewed as short-run predictions, the findings might not be vulnerable to attack as clearly erroneous. If Section 7 placed upon the government the burden of proving that Pacific Northwest would probably have *succeeded* in establishing itself in the California market, there might be room for reasonable disagreement as to whether that burden had been satisfied. The record might even sustain a finding that Pacific Northwest would probably *not* have managed in the short run to launch a feasible project to California. But those are not relevant questions. They are unresponsive to any issue posed by the statute; they provide no basis for the conclusion that the merger may not have substantially lessened "competition;" and they impose upon the government a burden of proof which Congress never intended it to bear.

Under Section 7, the government must show a reasonable probability that the company eliminated by an acquisition would otherwise have been a substantial competitive factor in the relevant market. It is not obliged, however, to go further and show, even as a matter of reasonable probability, that the acquired company would have been successful in its competitive undertakings. The relevant question, therefore, is not whether Pacific Northwest would ultimately have prevailed in its struggle for a share of the California market, but whether it was likely to have engaged in serious competition to that end. A negative answer to the first question by no means resolves the second. Yet it is to the former, rather than the latter, that the findings under discussion are addressed.

Thus, to say (R. 65, Fdg. No. 97) that Pacific Northwest would not have obtained a sale contract with the California distribution companies (or with Edison) is not to say it would not have competed for one, as indeed it did in the summer of 1956. The unsuccessful bidders at an auction are no less "competitors" than the one who carries away the prize. And, by the same token, when a supplier such as Pacific Northwest makes a determined attempt to secure an order from a buyer previously dependent upon another seller, it does not cease to be a "competitor" merely because its offer is not accepted. So long as the buyer has a genuine choice between alternative sources of supply, and so long as the efforts of each supplier serve as a limitation on the other's freedom to dictate terms, the essential elements of a competitive market are present, regardless of how the business is distributed among the rival sellers.

Similar considerations apply to the second finding (No. 99), that Pacific Northwest never could have put together a project acceptable to the Federal Power Commission and the California Public Utilities Commission. As we have shown (*supra*, pp, 29–30), such competition as there is in the natural gas industry is essentially competition for entry into the market. Thus, a certificate from the Federal Power Commission authorizing such entry is not a permit to engage in competition, but, if anything, a prize for having engaged successfully. And, conversely, the fact that an applicant is denied a certificate does not mean that his competition has not been significant, but only that be completed in vain.

The point can be illustrated by a recent example. From February, 1961, through July 12, 1963, two projects to serve the Southern California market were pending concurrently before the Federal Power Commission: (i) El Paso's Rock Springs project, involving a large sale to the Southern Companies (see, *supra*, pp. 44–45); and (ii) successive proposals by subsidiaries of Tennessee Gas Transmission Company to sell gas directly to Edison (*supra*, p. 22, fn. 5). These projects were in every sense rivals, for since the loss of Edison's business would have made it impossible for the Southern Companies to justify so large a purchase from El Paso,[11] it was clear that both projects could not be certificated. On July 12, 1963, the Commission denied the Rock Springs application (*supra*, p. 23, fn. 6). It is entirely possible that it will ultimately disapprove the direct sale to Edison as well (perhaps on the ground, for which there is precedent,[12] that the use of natural gas as boiler fuel in electric generating plants is an "inferior end use"). Manifestly, neither the Commission's recent action nor its possible future action, means that the two companies were not competing with one another during the period 1961 to 1963 for the right to serve the Southern California market. The withdrawal of either would

[11] The FPC hearing examiner in the Rock Springs proceeding explicitly so found in response to a request by the Commission for special findings on that very point. See "Special Findings Upon Applications For Certificates of Public Convenience and Necessity," issued June 14, 1962 in *El Paso Natural Gas Co.*, Docket G–16235.

[12] *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1; *El Paso Natural Gas Co.*, 22 FPC 900, 902–903.

have lessened competition, as would the acquisition of one by the other. By the same token, we submit, a prediction that the Power Commission would probably have denied any future application Pacific Northwest might have made to construct a line or sell gas to California does not impair the conclusion that Pacific would have competed vigorously for entry.

In any event, it is impossible for a court to foretell with any degree of accuracy, and hence improper for it to speculate upon, what action a regulatory agency might take as to a future project not yet even presented to it. If Pacific Northwest had actually consummated its sale to Edison in 1956 and then had been acquired by El Paso while its application for certificate authority was still pending before the Federal Power Commission, no one would seriously argue that the antitrust consequences of the acquisition should turn upon the court's prophecy as to the outcome of the administrative proceeding. Such a prophecy is equally inappropriate here.

It is clear, finally, that a conclusion as to the effect of this acquisition upon competition cannot be premised upon an assessment by the court of the economic soundness of Pacific Northwest's proposals of 1956, and still less upon a hypothetical forecast as to its technical and financial ability to launch a feasible pipeline project in the future. There was neither finding nor contention that Pacific Northwest was an insolvent or "failing" company, as defined in *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291. On the contrary, El Paso's president testified that at the time the merger negotiations began,

Pacific Northwest had "good bank balances in reasonable shape" (R. 518), and even the witness most skeptical of Pacific's prospects (Stuart Silloway, its former president and later an El Paso director) readily conceded the company's solvency (R. 916).

There may be cases, to be sure, in which a would-be supplier is so lacking in experience or resources, so exorbitant in price, so inferior in service or workmanship, that no buyer and no other supplier will take him seriously. Where the prospects of success are that remote, we concede it would be unfair to characterize the supplier, no matter how earnestly he seeks to trade, as a significant competitor in the market. It goes without saying, therefore, that the government must make a minimal showing here that Pacific's ambition to gain entry into the California market was not merely a quixotic fancy, a promoter's "pipedream" as it were, but a serious corporate endeavor, conceived and pursued by experienced and responsible businessmen and having, if not a "reasonable probability", at least a meaningful possibility of ultimate realization.

The evidence in the record was more than ample to discharge that minimal burden. Pacific Northwest was a massive enterprise, one of the two major interstate pipeline companies serving the trans-Rocky Mountain States. In the three years preceding the merger, it had persuaded the Federal Power Commission of the feasibility of its original pipeline project, had succeeded in raising $250 million for the construction of that project, and had installed, according to plan, a 2500-mile pipeline over some of the most rugged terrain in the United States. The

company's founder and chief executive, Mr. Fish, had had extensive experience in building, and initially operating, major pipeline systems, and had never failed to obtain the necessary financial backing for any venture he had undertaken (R. 789). Mr. Fish testified that both in retrospect and at the time of his negotiations with Edison, he was completely confident of his ability to finance a California project, and that the company's main investment house, with whose officers he had discussed the matter casually, had not discouraged him in his thinking (R. 789, 790). Beyond that, as we have shown, Pacific Northwest had important attributes—including its proximity to the centers of demand in California and its access to the vast reserves of Canada and the Rockies—which uniquely qualified it to serve the California market. These potentialities were apparently recognized by at least one important prospective customer, for the record shows that Edison had given serious and extended consideration to Pacific's 1956 proposal, had pleaded its merits to the distribution companies, and had even ventured the prediction that supplies of gas from the North "would grow materially over the years and probably come eventually to equal the supply coming from the East" (R. 648). Finally, Pacific's presence in the market was viewed with sufficient concern by El Paso to invoke an unprecedented competitive response on its part, and an abandonment of its established policy of nondealing with retail customers (*supra*, p. 15).

In these circumstances, it was manifestly improper for the court, pitting its judgment against that of Pacific's chief executive, to take upon itself an independent appraisal of the adequacy of the company's resources or the attainability of its ends. True, there was evidence that at the time of the acquisition Pacific Northwest was experiencing certain financial difficulties and operating problems (R. 900–905). Reasonable and responsible businessmen might have disagreed—indeed did disagree—as to the company's ability to overcome these difficulties and to undertake a large program of expansion. Mr. Silloway testified—and this is the backbone of El Paso's case—that the deliverability (though not the volume) of the San Juan Basin reserves had proved disappointing, that the capital outlay required to maintain that deliverability and to stimulate the development of reserves elsewhere exceeded the earnings generated by Pacific's certificated market in the Northwest, and that outside financing would have had to be obtained on unfavorable terms (R. 900, 904, 906). However, such circumstances were scarcely surprising, in view of the fact that the company, still in its infancy, had barely completed its pipeline and had not yet commenced full-scale operation. In pointing this out, Mr. Fish voiced confidence that the troublesome conditions would have been corrected (R. 791). He further testified that the expansion of the Pacific Northwest system into new market areas was the best prescription for its temporary difficulties and, as we have already indicated, that he had no doubt whatever of the

ability of the company to finance a feasible pipeline project to California (R. 791–792).

The ability to launch creative business ventures even in the face of obstacles such as those confronting Pacific Northwest in 1956 is the supreme test of entrepreneurship, and the struggle to overcome such obstacles, whether or not ultimately successful, is the very bone and marrow of competition. Whether the talent and resourcefulness of Pacific's executives would have been equal to the task they had set for themselves, whether they would ultimately have persuaded the California distribution companies to buy their gas, whether they could have raised the money to expand their system and develop their reserves, whether Mr. Fish's bold optimism or Mr. Silloway's cautious skepticism would in the end have proved better justified—those are questions which the Clayton Act requires to be submitted to the marketplace and resolved through the processes of competition. They are not judgments which a court may make, prospectively or retroactively in a Section 7 case.

In its recent decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362, this Court declared that "we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. *Standard Oil Company* v. *United States*, 337 U.S. 293, 313." Due regard for that admonition required the court below to confine its inquiry to the question whether an independent Pacific Northwest would have continued to strive for a place in the California market, and to

abstain from questioning the economic feasibility of that objective. The feasibility of a pipeline project—including the adequacy of the supporting gas reserves and financing—is a question regularly presented to the Federal Power Commission in its certification proceedings. Even with the assistance of a staff of trained and expert personnel, the Commission often requires many months to complete its investigation and arrive at a decision. Yet here the district court has undertaken a far more difficult and speculative inquiry—namely, whether Pacific Northwest would *ever* have been in a position to put together a viable California enterprise. We submit that the Clayton Act, in proscribing mergers tending to lessen "competition," sanctions no such inquiry.

We have shown that the findings discussed above, as applied to the short run, are unresponsive to the issue presented by the statute. As applied to the long run, they are not only irrelevant but invalid. The longer the perspective in which one considers the question, the greater becomes the probability that Pacific Northwest would ultimately have achieved its purpose of selling gas to California. And this is an industry in which the impact of a major acquisition upon the structure of competition cannot possibly be evaluated within a short-term frame of reference. It is an industry in which business planning must be projected decades into the future; in which nearly every important contract of sale im-

poses commitments of 20 years' duration; and in which the formulation and construction of a large-scale project may require years for its completion. Indeed, whatever reservations one may have as to the likelihood that Pacific Northwest would have been able to market its gas in California in the period which has gone by since the merger, or even in the years which lie immediately ahead, there is no basis whatever for a speculative conclusion that Pacific would not in the long run be in a position to fulfill its declared objective. The California market, expanding at an annual rate of 200 million cubic feet per day (R. 63, Fdg. 86), is and will continue to be the nation's most important market for natural gas; the Rocky Mountains and western Canada remain the largest undeveloped sources of natural gas supplies; and Pacific Northwest was, at the time of the acquisition, and, with one exception (Pacific Gas Transmission Company), is today the only pipeline in a position to link these vitally interdependent regions. In the light of these overriding long-term considerations, the temporary disabilities under which Pacific Northwest may have labored in the very first year of its operation were insufficient to justify the conclusion that the company's elimination as an independent enterprise did not tend substantially to lessen competition.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded to the district court for the entry of an appropriate decree.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
ROBERT L. WRIGHT,
Acting Assistant Attorney General.[14]
FRANK GOODMAN,
Assistant to the Solicitor General.
ROBERT B. HUMMEL,
MICHAEL I. MILLER,
Attorneys.

DECEMBER 1963.

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[14] In place of Assistant Attorney General William H. Orrick, Jr., who has disqualified himself for personal reasons.

APPENDIX A

The following table indicates the pages at which all exhibits relied on were admitted in evidence in the district court. All page references are to page numbers in the original transcript.

GX	2	Received by Motion and Written Order, page 585
	3	Received, pages 54 and 469
	7	Received, pages 75 and 397
	8	Received, pages 75 and 397
	9	Received, pages 75 and 397
	10	Received, pages 75 and 397
	12	Received, pages 75 and 397
	13	Received, pages 75 and 397
	14	Received, pages 75 and 397
	15	Received, pages 75 and 397
	17	Received, pages 75 and 397
	18	Received, pages 75 and 397
	21	Received, page 397
	22	Received, page 397
	23	Received, page 397
	24	Received, page 397
	25	Received, page 397
	26	Received, page 397
	27	Received, page 397
	28	Received, page 397
	29	Received, page 397
	30	Received, page 397
	31	Received, page 397
	51	Received, page 365
	52	Marked admitted in Clerk's Minutes

GX	55	Marked admitted in Clerk's Minutes
	58	Marked admitted in Clerk's Minutes
	61	Received, page 167
	62	Received, page 176
	70	Received, page 194
	71	Received, page 287—Limited only to Kayser's Testimony
	72	Received, page 287—Limited only to Kayser's Testimony
	73	Received, page 287—Limited only to Kayser's Testimony
	74	Received, page 287—Limited only to Kayser's Testimony
	75	Received, page 287—Limited only to Kayser's Testimony
	76	Received, page 287—Limited only to Kayser's Testimony
	77	Received, page 288
	80	Received, page 469
	81	Received, page 469
	82	Received, page 264
	83	Received, page 264
	87	Received, page 274
	88	Received, page 272
	92	Received, page 274
	94	Received, page 274
	95	Received, page 274
	96	Received, page 274
	97	Received, page 274
	99	Received, page 274
	116	Received, page 292
	117	Received, page 296
	118	Received, page 296
	120	Received, page 299
	123	Received, page 301
	124	Received, page 303

GX	125	Received, page 304
	126	Received, page 305
	127	Received, page 305
	130	Received, page 305
	131	Received, page 305
	132	Received, page 305
	133	Received, page 305
	134	Received, page 305
	136	Received, page 305
	137	Received, page 305
	138	Received, page 305
	139	Received, page 305
	139A	Received, page 305
	140	Received, page 305
	141	Received, page 305
	142	Received, page 305
	143	Received, page 305
	144	Received, page 305
	145	Received, page 305
	146	Received, page 305
	148	Received, page 305
	149	Received, page 305
	150	Received, page 305
	151	Received, page 402
	178	Received, page 402; Limited—Evidence to prove what So. Cos. & Edison said and offered, page 695
	179	Received, page 402; Limited—Evidence to prove what So. Cos. & Edison said and offered, page 695
	180	Received, page 402; Limited—Evidence to prove what So. Cos. & Edison said and offered, page 695

GX	182	Received, page 402; Limited, page 695
	186	Received, page 402; Limited, page 695
	195	Received, page 392
	260	Received, page 377
	295	Received, page 469
	299	Received, page 393; Fish Dep. Exhibit 3, stricken page 632; Fish Dep. Exhibit 4, stricken page 632; Fish Dep. Exhibit 5, Withdrawn page 633
	300	Received, page 446; Limited to what Fish thought at time, p. 629
	302	Received, page 466
	303	Received, page 469
	307	Received, page 469; and also page 642
	309	Received, page 469
DX	B	Received, page 528
	C	Received, page 528
	D	Received, page 440
	G	Received, page 520
	H	Received, page 533
	I	Received, page 562
	J	Received, page 562
	K	Received, page 601
	M	Received, page 580
	N	Received, page 582
	O	Received, page 582
	P	Received, page 585
	Q	Received, page 644
	R	Received, page 644
	S	Received, page 644

APPENDIX B

GX-15

TABLE 11-k.—*Comparison of Natural Gas Sales of El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation With Natural Gas Consumption in Utah for the Years 1950 and 1956 through 1960.*[1]

	Gas Sales MMCF [2]					Percent of Consumption			
	Consumption MMCF	El Paso Natural Gas Company	Utah Natural Gas Company [3]	Pacific Northwest Pipeline Corp.	Total El Paso, UNG & PNW	El Paso Natural Gas Company	Utah Natural Gas Company [3]	Pacific Northwest Pipeline Corp.	Total El Paso, UNG & PNW
1960	73,680	22,198	12,886	.....	34,794	30.3	16.6	.....	45.9
1959	61,401	.....	12,415	14,134	26,549	.....	20.2	23.0	43.2
1958	55,700	.....	12,841	13,223	26,064	.....	23.1	24.8	47.9
1957	57,004	.....	13,462	11,997	25,459	.....	23.7	21.0	44.7
1956	54,660	.....	14,425	N.A.	N.A.	.....	26.4	N.A.	N.A.
1950	28,368	.....	.....	.....	.....	.....	.....	.....	.....

N.A., not available.

[1] Consumption figures reported at approximately 14.892 @ 60 degrees F.; Sales figures at 14.99 @ 60 degrees F. except as otherwise noted. (See Sales Tables for individual States.)

[2] Pacific's and El Paso's sales to Mountain Fuel Supply Company at intersection of the companies' lines near Green River, Wyoming for resale by Mountain Fuel in Utah are included in Pacific's and El Paso's Utah sales. See Mountain Fuel's Reports to Stockholders, 1956 and 1957 and Reports to FPC 1957 through 1959.

[3] Utah Natural Gas Company has been a subsidiary of El Paso since Nov. 1952. (See El Paso's 1953 Reports to Stockholders and the F.P.C.)

Source: Consumption—1960, 1959, Minerals Yearbook, Fuels, Volume 2, p. 226; 1956-1950, 1950 Minerals Yearbook, Fuels, Volume 2, p. 227. Sales—El Paso's and Pacific's Annual Reports to FPC; 1960, pp. 426, 428, 430, 432, 434; 1956-1957, pp. 73, 77-81; 1956-1950, pp. 67, 71-75. Utah Natural Gas Company from El Paso's answer to Plaintiff's Supplemental Interrogatory No. 3 Schedules 7, 8 & 9.

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